82-1983

No.

Office - Supreme Court, U.S.
FILED
JUN 3 1983
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1982

ROSS R. CALIGURI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS INVOLVED

1. Was the Petitioner's Constitutional Right to Due Process violated when the Trial Court refused to charge the Jury with the defense of "Government overreaching" or "outrageous Governmental participation and misconduct?"

2. Was the Petitioner's Constitutional Right to Due Process violated when the Trial Court restricted and limited its instruction to the Petit Jury on Withdrawal from a Conspiracy? Put another way, did the Trial Court violate the Petitioner's Constitutional Rights by depriving Petitioner of the defense of Withdrawal from a Conspiracy by its charge to the Petit Jury?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1982
No.

ROSS R. CALIGURI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, ROSS R. CALIGURI, respectfully requests that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Fourth Circuit, entered on May 3rd, 1983, affirming a judgment of the District Court of Maryland entered on May 6th, 1982, convicting Petitioner after a jury trial of the crime of Conspiracy in violation of Title 21 U.S.C., Section 846.

As a consequence of this conviction, the Petitioner was sentenced to a term of six (6) years imprisonment; in addition, the Trial Court imposed a committed fine of Five Thousand ($5,000.00) Dollars.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit affirmed the judgment of conviction without formal written opinion; however, an unpublished written opinion was rendered and is annexed hereto, as part of Appendix "A."

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit was rendered on May 3rd, 1983.

The jurisdiction of this Court is invoked, made, and conferred under 28 U.S.C. 1254(1) and under Rule 19(1) of the Rules of the Supreme Court.

RULES OF THE SUPREME COURT

Rule 19, Considerations Governing Review on Certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a Court of Appeals has rendered a deci-

sion in conflict with the decision of another Court of Appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

STATEMENT OF THE CASE

On May 11th, 1981, in Salisbury Maryland, the Drug Enforcement Administration (DEA) initiated and led a "reverse undercover operation" wherein DEA Agents posed as and purported to be drug sellers.

The DEA leased several motel rooms for the operation, brought marijuana with them for sampling, utilized a confidential informant to solicit the prospective buyers, rented a farm house to store the drugs, actually had 15,000 pounds of marijuana transported from Florida to Maryland, utilized trailer trucks and airplanes in this operation, and rented scales to weigh the marijuana.

Co-defendants, DEREEDER and HUBERT, having been lured and importuned by the confidential informant to Maryland, met with the undercover DEA agents; they discussed a prospective marijuana deal advising that they were acting on behalf of the Petitioner, CALIGURI.

The DEA provided a sample of the drugs for testing as to its quality.

During the next several days, negotiations continued and the undercover DEA agents were informed that HUBERT desired to purchase 50 pounds of marijuana while DEREEDER was arranging to purchase the entire 15,000 pounds of marijuana on behalf of several drug buyers, excluding the Petitioner, CALIGURI.

The DEA escalated the proposed sale by offering the drugs partially upon credit. Put another way, the Government agents offered an equal amount of the drugs on consignment for every pound of marijuana actually paid for. As a further enticement, the Government agents offered a 20% discount for a separate and future drug operation.

On May 12th, 1981, HUBERT gave DEA agents $28,000.00 for the "future" deal, having been cajoled into believing this money was needed to cover and defer future expenses.

Negotiations continued and on May 14th, 1981, DEREEDER introduced GEORGE FERGUSON, a buyer, to the DEA; he advised the DEA that he represented buyers from Florida and Washington. That evening, as a further inducement, DEA agents brought DEREEDER and FERGUSON to the rented farm house to view the bulk of marijuana and gave them each samples.

The following day, Petitioner, CALIGURI, met with DEREEDER, HUBERT and DEA Agents at Salisbury Airport. Petitioner inquired if the Mari-

juana had been brought from Florida and why it could not be brought directly to New York. There were no discussions relating to price, quantity, quality, or delivery of the drugs. There was no discussion concerning any purchase of drugs.

Soon thereafter, both DEREEDER and HUBERT were advised by Petitioner that he was suspicious, did not like the "set-up" and was no longer interested in the "deal." Petitioner advised that he was not going to become involved. In fact, no monies were ever provided by Petitioner and he had "backed-out of the deal", prior to any consummated transactions.

Even as late as May 19th, 1981, Petitioner was solicited into the transaction, but again refused and disavowed his association.[1]

The principal Government witness admitted that Petitioner's disavowance almost "wiped the whole thing out." That Petitioner's refusal to participate almost defeated the goal of the conspiracy.

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1. A Pilot had flown to New York on behalf of Dereeder to pick up Petitioner; he refused to go to Maryland and told the Pilot he wanted nothing to do with the deal.

POINT ONE

THE TRIAL COURT'S REFUSAL TO RENDER A DUE PROCESS CHARGE TO THE PETIT JURY AND ALLOW A FACTUAL DETERMINATION TO BE MADE AS TO WHETHER THE GOVERNMENT'S CONDUCT WAS SO OUTRAGEOUS AS TO CONSTITUTE A BASIS FOR A DISMISSAL OF THE CHARGES WAS A VIOLATION OF THE PETITIONER'S CONSTITUTIONAL RIGHTS.

The Due Process defense of Governmental overreaching, over-participation or outrageous conduct emanates from a consideration of the defense of Entrapment. (*Mikell, The Doctrine of Entrapment in the Federal Courts*, 90 U. Pa. L. Rev. 245 (1947); *Donnelly, Judicial Control of Informants, Spies. Stool Pigeons and Agents Provocateurs*, 60 Yale L.J. 1091, 1098-1115 (1951); *Note, Entrapment*, 73 Harv. L. Rev. 1333 (1960).

Of recent vintage, the Supreme Court has spoken of Governmental overreaching and Governmental outrageous conduct (*Sherman v. U.S.*, 356 U.S. 369 (1958); *U.S. v. Russell*, 411 U.S. 423 (1973); *Hampton v. U.S.*, 425 U.S. 484 (1976).

Mr. Justice Powell, in his separate concurring opinion, *Hampton v. United States*, 425 U.S. 484, alluded to the obligation of the federal courts to carefully examine law enforcement practices; at page 494, footnote No. 5:

> "... We should not disregard lightly Mr. Justice Frankfurter's view that there is responsibility 'necessarily in [the court's] keeping ... to accommodate the dangers of over zealous law enforcement

and civilized methods adequate to counter the ingenuity of modern criminals."

In *Sherman v. United States,* 356 U.S. 369, 383, Mr. Justice Frankfurter observed:

> "Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. The whole ameliorative hopes of modern penology and prison administration strongly counsel against such a view."

In *Russell, supra.,* Mr. Justice Rehnquist recognized the import of Governmental over-participation and abuse of Due Process. At page 431, he stated:

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to [411 U.S. 432] obtain a conviction, cf. Rochin v. California, 342, U.S. 165, 96 L.Ed. 183, 72 S. Ct. 205, 25 ALR2d 1396 (1952), the instant case is distinctly not of that breed." (*emphasis supplied*).

Likewise, Circuit Courts have followed the dictates and rationale of the repugnancy of outrageous Governmental conduct.

Judge Friendly's expression in *U.S. v. Archer,* (486 F.2d 670, 2d Cir. 1973) is noteworthy:

> "There is certainly a [constitutional] limit to allowing governmental involvement in the crime. It would be unthinkable, for example, to permit government

agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums." (676-677)

In *U.S. v. West,* (511 F. 2d 1083, 3rd Cir., 1975) the Court held:

"Frequently, it is permissible law enforcement practice for an undercover agent to obtain evidence of unlawful traffic in narcotics by purchasing heroin from a suspected drug peddler. But when the government's own agent has set the accused up in illicit activity by supplying him with narcotics and then introducing him to another government agent as a prospective buyer, the role of government has passed the point of toleration. Moreover, such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing." (Emphasis supplied)

The defense of "outrageous" government conduct has also been recognized in other Circuits. (See *U.S. v. Weber,* 518 F.2d 987, 8th Cir., 1975; *U.S. v. Quintana,* 508 F. 2nd 867, 7th Cir. 1975).

In *U.S. v. Twigg,* (588 F.2d 373, 3rd Cir. 1979) the Court recognized the defense of "outrageous" government conduct and stated at page 378:

". . . although proof of disposition to commit the crime will bar application of the entrapment defense, fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct is 'outrageous.' "

In *U.S. v. Romano* (278 F. 2nd 202, 2nd Cir., 1960) the Court reasoned that:

> "... it is unthinkable that the Government should prosecute those whom it urged to commit crimes and therefore our Courts refuse to countenance prosecutions which rest on such an unsavory foundation."

In *United States v. Tobias*, 662 F2d 381 (1981) at page 386, the Court clearly restated the doctrine set out in *Twigg, supra*, and its progeny:

> "... The Government may not instigate the criminal activity, provide the place, equipment, supplies, and knowhow, and run the entire operation with only meager assistance from the defendants without violating fundamental fairness."

Factual defenses such as Entrapment (issues directed to defendant's pre-disposition and Government's original solicitation) insanity (issues directed to defendant's state of mind and ability to comprehend "right from wrong") and alibi (issues directed to credibility of defense and prosecution witnesses) have always been left for a Petit Jury's determination. (*U.S. v. Andrew*, 666 F.2nd 915, 5th Cir., 1982; *U.S. v. Brandon*, 633 F.2nd 773, 9th Cir., 1980; *U.S. v. Hendrix*, 542 F.2nd 879, 2nd Cir., 1976) Cert. den. 97 S. Cr. 1609, 1977; *U.S. v. Swanson*, 572 F.2nd 523, 5th Cir., Cert. den. 995 Cr. 152, 1978); *U.S. v. Hoke*, 610 F.2nd 678, 9th Cir., 1980).

Surely, the defense of Governmental overreaching or over-participation or outrageous conduct, which emanates from the concept of Entrapment is a factual issue for a Petit Jury to ultimately decide.

Contrasted with the intellectual proclivities of an isolated Judge what better hold on impermissible Government conduct is there than the verdict and determination by the representative peers of a community, the Petit Jury.

If ours is a "Government by the People and for the People," then surely the Petit Jury has both the right and the obligation to scrutinize the Government's conduct and determine if they have gone too far; lest George Orwell's "1984" precipitate from fiction to reality.

In the case at bar, the Petitioner requested a Due Process charge which was refused. Petitioner was prohibited from arguing that the Government's conduct was outrageous and violated his constitutional rights.

The function of a jury is to stand between the sovereign and the individual citizen (*Duncan v. Louisiana*, 391 U.S. 145 (1968).

Ergo, the jury function of scrutining the Government's conduct is both apparent, necessary and constitutionally mandated.

In addition to the traditional defenses of alibi, insanity and entrapment, Juries have also considered and decided First and Fifth Amendments issues. This is consistent with petitioner's position that any Governmental overreaching must ultimately be scrutinized by a Jury.

Issues concerning "Community standards" and "freedom of speach" are factual issues left to a jury's determination (*Pinkus v. U.S.*, 436 U.S. 293, 1978;

U.S. v. Bagnell, 679 F.2nd 826, 11th Cir., 1982).

Police Conduct and the voluntariness of a confession are factual issues ultimately to be determined by a Petit Jury (*U.S. v. Sampal*, 636 F.2nd 621, D.C. Cir., 1980; *U.S. v. Fera*, 616 F.2nd 590, 1st Cir., 1980, cert. den. 446 U.S. 969, 1980).

As a general proposition of law, an accused is entitled to have a determination by a jury based upon *his* theory of the prosecution. *U.S. v. Prieskorn* (658 F.2nd 631, 8th Cir., 1981) succinctly sets forth this principle; at page 636, the Court states:

> "It is well established that a defendant in a criminal case is entitled to an instruction on his theory of the case if there is evidence to support it and a proper request is made. A proper request is one which is timely, is supported by the evidence and sets forth a correct statement of the law." (citations omitted).

Parenthetically, the Court also recognized that the evidence of the accused's defense need only come from the prosecution's case and neither requires the defendant to perpetuate testimony nor produce any evidence to establish his theory. Continuing on page 636, the Court reasoned:

> "The defendant need not testify nor offer any evidence or witnesses as a prerequisite to the trial court instructing as to the theory of defense. The foundation of the theory may rest upon evidence elicited from government witnesses either on direct or cross-examination (8A Moore's Federal Practice, Section 30.03(1), 30-7, 2nd ed. 1981)."

In *U.S. v. Gilliss*, (645 F.2d 1269, 8th Cir., 1981)

the Court, recognized it was the content of a requested instruction rather than the form that premised a denial of a constitutional right to a defense. At page 1274, the Court stated:

> "A defendant is entitled to an instruction on his theory of the case if there is evidence to support it and a proper request is entered (U.S. v. Brown, 540 F.2nd 364, 8th Cir. 1976). A defendant, however, is not entitled to an instruction in a particular form even if the requested instruction is proper and in form suitable for use by the Court, the Court retains discretion in framing the instruction."

Notwithstanding the probative weight of the evidence an accused is nontheless entitled to have a jury presented with his defense theories. In *U.S. v. Creamer,* (555 F.2nd 612, 7th Cir., 1977) the Court held at page 614:

> "A criminal defendant is entitled to have a jury instruction on any defense which provides a legal defense to the charge against him and which has 'some foundation in the evidence, *"even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility".' U.S. v. Hillsman,* 522 F.2nd 454, 7th Cir. 1975)" (emphasis supplied).

The Tenth Circuit, has held, in *Sparrow v. U.S.,* (402 F.2nd 826, 10th Cir. 1968) that the defense of "good faith" in a mail fraud and securities act prosecution, must be presented for jury determination if there is evidence to support the defense theory. At page 828, the Court stated:

> "It is apparent that a defendant is entitled to adequate instructions on his theory of the case if suffi-

> cient evidence is presented to support it" (citations omitted)

The Seventh (7th) Circuit, likewise, has held, in *U.S. v. Fountain* (652 F.2nd 1083, 7th Cir., 1981), at page 1095:

> " . . . that a defendant in a criminal case is entitled to have a jury consider any defense theory that has some foundation in the evidence, however tenuous." (citations omitted).

In the case at bar, it was established through the government witnesses that the Government *initiated* contact with the accused (co-defendants and co-conspirators Dereeder and Hubert); there was no on-going criminal enterprise in which the Government had hoped to infiltrate. D.E.A. agents posed as sellers of Marijuana. The initial solicitation by the Government was created through a paid informer. The Government financed hotel rooms and meals for this operation; they rented a farm house to store the drugs; they leased large scales to weigh the drugs; they utilized airplanes and trucks to transport 15,000 lbs of Marijuana from Florida to Maryland; they supplied all of the drugs forming the gravaman of the conspiracy charge; on several occasions they actually distributed samples of the drugs.

Put another way, the Government created the crime, supplied all the necessary ingredients for its completion and unquestionably distributed drugs, without all of which there would have been no crime committed by any of the defendants. The Government's participation was not merely peripheral but rather all inclusive and extensive.

The issue of whether the Government violated the basic standards of decency and justice requiring dismissal of the charges permeated the entire trial. It was clearly the function of the jury, based upon the overwhelming participation by the Government, to determine the line between the enticement of the unwary innocent and the trap for the unwary criminal.

POINT TWO

THE PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE TRIAL COURT LIMITED AND RESTRICTED ITS INSTRUCTION ON "WITHDRAWAL FROM A CONSPIRACY." THE COURT'S CHARGE EFFECTIVELY DEPRIVED PETITIONER OF A VALID AND MERITORIOUS DEFENSE AS WELL AS BEING TANTAMOUNT TO A DIRECTED VERDICT OF GUILT.

A participant in a criminal venture may withdraw from the illegal enterprise. The stated policy behind the legal recognition of the defense of "withdrawal" is to encourage conspirators to weaken the criminal combination by lessening its number of participants (*Developments in the Law-Criminal Conspiracy*, 72 Harv. L. Rev. 920, 957-1959; *Hyde v. U.S.*, 225 U.S. 347, 1912).

The defense of withdrawal is applicable to a conspiracy charge (*U.S. v. U.S. Gypsum Co., et al.*, 438 U.S. 422, 1978).

The elements of withdrawal are no longer in dispute: A participant must notify a co-participant of his intention to withdraw from the continuation of the criminal enterprise and must take an affirmative step, by act or words, that tends to defeat the purpose of or

disavow the goal of the criminal enterprise. *(U.S. v. U.S. Gypsum Co., et al., supra; U.S. v. Paunell,* 581 F.2d 1374, 10th Cir., 1978; *U.S. v. Lowell,* 490 F. Supp. 897, D.C., N.J., 1980; *U.S. v. Smith,* 623 F. 2d 627, 9th Cir., (1980); *U.S. v. Battista,* 646 F.2nd 237, 6th Cir., (1981); *U.S. v. Continental Group, Inc.,* 603 F. 2nd 444, 2nd Cir., 1979; *U.S. v. Borelli,* 336 F. 2nd 376, 2nd Cir. 1964; *U.S. v. Hickey,* 360 F. 2nd 127, 7th Cir. (1966); *U.S. v. Bastone,* 526 F.2nd 971, 7th Cir. (1975), rehearing en banc denied 1976; *Eldrege v. U.S.,* 62 F. 2nd 449, 10th Cir., 1932).

Constitutional error is assigned to that aspect of the Trial Court's charge severely restricting the withdrawal concept.

The charge stated:

> "In order to escape responsibility, a defendant must withdraw *before* an overt act in furtherance of the conspiracy has been committed" (emphasis supplied).

And, further on, the charge stated:

> "... if you find that he joined the conspiracy, and that he took affirmative steps to withdraw but that such steps were taken *after* an overt act was committed, then the defense of withdrawal is *not* available to him" (emphasis supplied).

The jury, during its deliberations, requested a clarification on the issue of withdrawal, and the Trial Court, for a second time, reiterated the original instructions thereby compounding the constitutional error.

This erroneous charge created problems of constitutional dimension in that it effectively took away the defense of withdrawal from the Petit Jury's consideration as well as depriving the Petitioner of a fair trial and Due Process.

A general conspiracy charge pursuant to Title 18 U.S.C. Section 371, requires the pleading and proof of an overt act in order to establish the crime charged.

The Petitioner was charged with the crime of Conspiracy pursuant to Title 21 U.S.C. Section 846, which requires merely the pleading and proof that two or more persons combined or agreed to violate a particular narcotic statute. Put another way, a prosecution pursuant to Title 21 U.S.C. Section 846 does not require either the pleading of or the proof of an overt act being committed in furtherance of the conspiracy[2] (*U.S. v. Garcia*, 655 F. 2nd 59 5th Cir., 1981).

When an overt act is required for the prosecution of a conspiracy, an accused who withdraws before that act is committed may not be punished as a member of the conspiracy (*U.S. v. Heckman*, 479 F. 2nd 726, 3rd Cir., 1973; *U.S. v. Beck*, 118 F. 2nd 178, 7th Cir., 1941). Prior to an overt act being committed, there is no crime committed in a prosecution under Title 18 U.S.C., §371.

After withdrawal, an accused no longer stands as a member of the conspiracy and as a general rule, the

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2. The Supreme Court had recognized early in its consideration of the law of conspiracy that an overt act is somewhat likened to the key that starts an automobile.

later acts of his former co-conspirators do not bind him (*U.S. v. Reed*, 658 F. 2nd 1225, 7th Cir., 1981); withdrawal will exonerate him from subsequent crimes. (*Rotenberg, Withdrawal as a Defense to Relational Crimes,* 1962 Wis. L. Rev. 596, 604).

In *Hyde v. U.S., supra*, at page 388, the Court stated:

> 'an overt act is simply evidence that the conspiracy has passed beyond words and is on foot when the act is done."

However, withdrawal after an overt act is effected, as applied to a conspiratorial charge may well operate to render the accused criminally responsible and liable for his previous agreement and for the previous acts of his former co-conspirators (*U.S. v. Wooten*, 638 F. 2nd 941, 4th Cir. 1982; *U.S. v. Reed*, 658 F. 2nd 1225, 7th Cir., 1981).

Where no overt act is required for the prosecution of a conspiracy, as in the case at bar, then withdrawal is a partial rather than a complete defense (1982 Fordam L. Rev. Vol. 51, No. 3, 441).

By its very instruction, the Trial Court deprived the Petitioner of both the partial and complete defense of withdrawal.

Simply stated, withdrawal can be accomplished at any time prior to the completion of the crime. The consequences of when withdrawal occurs will dictate whether the defense is partial or complete. The point in time of disavowance of an ongoing criminal scheme will determine whether the withdrawer is to be totally

exonerated or whether he is to be held responsible for his agreement prior to his withdrawal.

In the case at bar, the limiting or restrictive instruction by the Trial Court prevented the application of the defense of withdrawal subsequent to the commission of an overt act. This took away from the jury's consideration the defense of withdrawal as a partial defense.

Since, in fact, the conspiratorial charge at bar, required no overt act, the proper instruction, as requested by Petitioner, should have been framed to allow withdrawal at any time prior to the time period covered by the Indictment or at any moment prior to the end of the Conspiracy (*U.S. v. Continental Group, Inc.*, 603 F. 2nd 444, 2nd Cir., 1979); *U.S. v. Panzanella*, 416 F. Supp. 68, W.D.P.A. 1976; *Hyde v. U.S., supra; U.S. v. Lowell*, 649 F. 2nd 950, 3rd Cir., 1987; *U.S. v. Wentland*, 582 F. 2nd 1022, 5th Cir., 1978); *U.S. v. Parnell*, 581 F. 2nd 1374, 10th Cir., 1978).

The failure to render such an instruction took away from the jury's consideration the defense of withdrawal as either a partial or complete defense.

This restrictive and limiting type of instruction has been held to constitute constitutional error. Mr. Chief Justice Berger, writing for this Court, in *U.S. v. Gypsum Co., supra.*, stated at page 464:

> "The charge, fairly read, limited the Jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy. *Nothing that we have been able to find in the case law suggests, much less commands, that such continuing blinders be placed on the jury's freedom to*

consider evidence regarding the continuing participation of alleged conspirators in the charged conspiracy. Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment."

Not only is the Fourth Circuit Court of Appeals' decision in conflict with the holdings of this Supreme Court, but also creates a legal disparity and dichotomy between Circuits. (See *U.S. v. Richardson*, 596 F. 2nd 157, 6th Cir. 1979; and *U.S. v. Jimenez*, 622 F. 2nd 753, 5th Cir., 1980; *U.S. v. Reed*, 658 F. 2nd 1225, 7th Cir., 1981).

The legal efficacy of the Trial Court's charge, under any prosecution for conspiracy is paradoxyl. To suggest that the defense of "withdrawal" can only be applied prior to an overt act being committed is tantamount to stating that there is no defense of "withdrawal" in a conspiracy prosecution. That is the antithesis of the law (*U.S. v. Gypsum Co., et al., supra.*)

In a conspiracy prosecution under Title 18 U.S.C. Section 371, until an overt act occurs there is no crime. Restricting the "withdrawal" defense to the period between the conspiratorial agreement and the first overt act is denying the defense of "withdrawal." One may only "withdraw" from a crime that he once was a participant in.

In a conspiracy prosecution under Title 21 U.S.C. Section 846, the illegal agreement without an overt act constitutes the crime. Restricting the "withdrawal" defense to a period prior to the first

overt act defeats and limits even the application of the partial defense of "withdrawal."

Under Section 846 (supra), and Section 371 (supra), the "withdrawal" by a conspirator can occur at any time prior to the goal of the conspiracy being accomplished. The time frame within which the "withdrawal" occurs will determine whether the defense is absolute (exonerates the accused) or partial (extends criminal liability for only those acts prior to the "withdrawal").

As applied to the defense of "withdrawal" Section 346 of Title 21 U.S.C. is unconstitutional. Since the incohate conspiracy charge is complete when the agreement is made, the "withdrawal" defense can never be absolute or full and may only be applied as a partial defense. Effectively, then, the statute by its terms prohibits, limits and denies the defense of "withdrawal" which is unconstitutional.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI BE GRANTED.

Respectfully submitted,

MICHAEL S. WASHOR
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Members of the Bar of the
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WASHOR, GREENBERG AND WASHOR, ESQS.
Attorneys for petitioner
On Petition for Certiorari

APPENDIX "A"
UNPUBLISHED WRITTEN OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 82-5161

UNITED STATES OF AMERICA,

Appellee,

v.

ROSS R. CALIGURI and JAMES P. HUBERT,

Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Shirley B. Jones, Judge.

Argued: December 10, 1982 Decided: April 12, 1983

Before WINTER, Chief Circuit Judge, RUSSELL, Circuit Judge and BRYAN, Senior Circuit Judge.

Michael Washor (Washor, Grenberg and Washor on brief) and Robert I. Kaline (Jay Gregory Horlick on brief) for Appellants; Stephen J. Immelt, Assistant United States Attorney (Steven A. Allen, Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

Defendants Ross Caliguri and James Hubert appeal their convictions for conspiracy to possess with intent to distribute a quantity of marijuana in excess of 1,000 pounds.[1] A jury for the Federal Court for the District of Maryland found both defendants guilty and the Court sentenced each man to a term of imprisonment as well as the payment of fines. Finding no error on the part of the District Court, we affirm the judgments.

I

The events in this case commenced in April of 1981 when an undercover informant of the Drug Enforcement Administration (D.E.A.), Ronald Poe, informed a reputed drug trafficker, Edward Dereeder, that he had marijuana for sale. Dereeder in turn contacted defendant James Hubert and told him on Poe's conversation. Hubert said he had a friend who might be interested in a large marijuana purchase.

1. 21 U.S.C. §856. The statute provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Numerous conversations between the parties ensued and in early May of 1981 the D.E.A. landed an airplane loaded with marijuana at an airfield near Ocean City, Maryland. Poe rented hotel rooms for Hubert and Dereeder who drove to Maryland to inspect the contraband. Both men were introduced to Agents O'Leary and Miller of the D.E.A. who showed them the marijuana at the airstrip and gave them samples.

In the meantime, Hubert contacted defendant Caliguri, who according to Hubert, was to be the principal purchaser of the marijuana. Caliguri then arrived from New York to view the marijuana, met the agents, discussed a sale, and received a sample.[2]

After returning to his home in New York, Caliguri expressed his concern to Hubert that they might be the possible targets of an undercover operation. Despite his apprehension and refusal to return to Maryland, the sale proceeded and Hubert Dereeder, and a third party were arrested.

After the grand jury returned indictments against the defendants, each made various pre-trial motions to suppress the evidence and quash the indictment.[3] These motions were denied. A jury convicted both men of violating 18 U.S.C. §846, and the Court sentenced Caliguri to six years imprisonment

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2. During his conversation with the agents, Caliguri propounded a number of questions regarding the transportation of the marijuana. In addition, Caliguri inquired as to the amount of marijuana the agents might obtain, asking "how deep is the well?"

3. Dereeder also was indicted.

and Hubert to four years imprisonment.

II

Caliguri first urges that he withdrew from the conspiracy and that the District Court improperly instructed the jury on the availability of this defense. The Court told the jury that "in order to invoke the withdrawal defense, a defendant must withdraw from the conspiracy before any overt act in furtherance of the conspiracy has been committed." The Court then placed the burden on the Government of disproving withdrawal beyond a reasonable doubt.

A conspirator's withdrawal marks his disavowal or abandonment of the conspiracy. *Hyde v. United States*, 225 U.S. 347, 369 (1912). After withdrawal, a defendant no longer stands as a member of the conspiracy and the later acts of the conspirators do not bind him. *United States v. Read*, 658 F.2d 1225, 1232 (7th Cir. 1981). Nonetheless, the defendant remains liable "for his previous agreement and for the previous acts of his co-conspirators in pursuit of the conspiracy." *Id., United States v. Wooten*, 688 F. 2d 941, 947 (4th Cir. 1982). In consequence, the District Court's instruction on withdrawal constituted a proper statement of the law. *See also United States v. Nicoll*, 664 F. 2d 1308, 1315 (5th Cir. 1982) *cert. denied* 102 S. Ct. 2929 (1982).

Caliguri next argues that the evidence presented at trial was insufficient to support his conviction. The evidence, however, discloses the existence of an agreement whereby Dereeder and Hubert assented to work as Caliguri's agents for the purchase of the marijuana. Cliguri further committed an overt act in pursuit of

the goal of the conspiracy when he travelled to Maryland and inspected the marijuana.

Lastly, both Hubert and Caliguri maintain that the investigation conducted by the D.E.A. violated their rights to due process of law. Although some future defendant may successfully rely upon the defense of Government misconduct, the tactics of the Government in the present instance fell short of the "outrageous" conduct denounced in *United States v. Russell*, 411 U.S. 423 (1973). Despite the active role maintained by the Government throughout the investigation, the D.E.A. agents did not press a sale upon an unwilling buyer. Rather, the defendants readily accepted the Government's offer. See *United States v. Tavelman*, 650 F.2d 1133 (9th Cir. 1981) *cert. denied* 102 S. Ct. 1429. The judgment of the District Court is affirmed.

AFFIRMED

APPENDIX "B"
PETITIONER'S WRITTEN REQUEST OF THE TRIAL COURT TO CHARGE THE PETIT JURY WITH THE DEFENSE OF "WITHDRAWAL FROM A CONSPIRACY"

DEFENDANT'S REQUEST TO CHARGE CONCERNING WITHDRAWAL FROM A CONSPIRACY

REQUEST TO CHARGE NO. 12
(withdrawal from a conspiracy)

If the jury should conclude that a conspiracy existed and that defendant Caliguri was a member of the conspiracy charged and that an overt act had taken place in furtherance of the conspiratorial goal, it is then your duty, under the facts of this case, to consider if the defendant Caliguri withdrew from the conspiracy.

Withdrawal from a conspiracy requires two elements: firstly, the accused must take an affirmative act that would tend to defeat the purpose of the conspiracy. This is called a disavowance of a conspiracy. Secondly, the disavowance of the conspiracy must be communicated to a co-conspirator. It matters not, what the reason is that an accused disavows a conspiracy.

The defendant Caliguri contends that he did not furnish monies to further the ends of the conspiracy because he was suspicious of some of the participants being federal agents and that prior to the completion of the conspiracy he communicated this fact to the co-conspirator, Dereeder.

If you find that the government failed to prove beyond a reasonable doubt that defendant Caliguri provided monies and that he was suspicious of some of the sellers being agents of law enforcement, and did in fact communicate these factors to a co-conspirator, I charge you, as a matter of law, that defendant Caliguri had withdrawn from the conspiracy and you must find him "not guilty."

(*Hyde v. U.S.*, 225 U.S. 347; *U.S. vs. Lowell*, 649 F. 2nd 950; *U.S. v. Wentland*, 582 F. 2nd 1022; *U.S. v. Parnell*, 581 F. 2nd 1374).

APPENDIX "C"

THE TRIAL COURT'S CHARGE ON WITHDRAWAL FROM A CONSPIRACY

One has to do with withdrawal from a conspiracy and this instruction pertains to the defendant Caliguri. Whether it is applicable depends, of course, on the facts as you find them to be. The principle involved does not apply and is not urged by the defendant Hubert. If you conclude in this case that the conspiracy as charged did, indeed, exist, and if you find beyond a reasonable doubt that the defendant Caliguri was a member of that conspiracy, and that an overt act took place at some time in furtherance of that conspiracy, then you would have before you for consideration whether Caliguri withdrew from the conspiracy.

Withdrawal requires two elements: First, a defendant must take some affirmative step either by act or by word to defeat the purposes of the conspiracy, or to disavow the conspiracy. This must be communicated by him in a manner reasonably calculated to reach the co-conspirators. The reason for the disavaowal does not matter, it can be for any reason. But, in order to escape responsibility and in order to invoke the withdrawal theory, a defendant must withdraw from the conspiracy before any overt act in furtherance of the conspiracy has been committed. If you find that Caliguri joined the conspiracy but later took some affirmative steps to disavow the conspiracy, and if you further find that he took these steps before any overt act by any co-conspirator was committed, then you would find him not guilty of the conspiracy charge because you would then have found that he had

withdrawn from it. But, on the other hand, if you find that he joined the conspiracy and he took affirmative steps to withdraw, but that those steps were taken after an overt act was committed, by some member of the conspiracy, then the defense of withdrawal would not be available to him.

I remind you again the defendant does not have any burden of proof. The burden is on the government to show beyond a reasonable doubt that Caliguri joined the conspiracy and further that he did not take any affirmative steps to withdraw before any overt act in furtherance of the conspiracy was committed." (734-735)

APPENDIX "D"

THE TRIAL COURT'S SUPPLEMENTAL CHARGE, DURING PETIT JURY DELIBERATIONS, ON WITHDRAWAL FROM A CONSPIRACY

"Now with regard to the withdrawal instruction, withdrawal from a conspiracy, I instructed you before and repeat the instruction that if you conclude that the conspiracy as charged did, indeed, exist and if you conclude that the defendant Caliguri was a member of that conspiracy, and if you further find that an overt act took place at some time in furtherance of the conspiracy, then you would consider whether he, that is Caliguri, withdrew from the conspiracy. Withdrawal from a conspiracy requires two elements: First of all, the defendant must take some affirmative steps either by acts or by words to defeat the purpose of the conspiracy, or to disavow a conspiracy. So there must then be some affirmative step to defeat the purposes or to disavow the conspiracy. The second element required is that this must be communicated by the defendant in a manner reasonably calculated to reach the co-conspirator. The reason for the disavowal does not matter. It can be for any reason at all. In order to escape responsibility, though, a defendant must withdraw from the conspiracy before any overt act in furtherance of the conspiracy before any overt in furtherance of the conspiracy has been committed. On the other hand, and I have to give you the alternative, if you find that he joined the conspiracy and that he did take some affirmative steps to withdraw from it but if those affirmative steps were taken after an overt act had been committed by any co-conspirator, then the defense of withdrawal would not be available

to him. I remind you again, as I did before, that the defendant does not have the burden of proof on this or on any element of the case. The burden is and remains on the government and in this regard is on the government to show beyond a reasonable doubt that Caliguri joined the conspiracy and further that he did not take affirmative steps to withdraw before an overt act in furtherance of the conspiracy was committed." (781-782).

APPENDIX "E"

PETITIONER'S WRITTEN REQUEST OF THE TRIAL COURT TO CHARGE THE PETIT JURY WITH THE DEFENSE OF GOVERNMENT VIOLATION OF DUE PROCESS

As jurors in this case, you are to consider the nature and extent of the government's participation in the crimes charged.

If you conclude that the governmental involvement in the criminal activities of this case has reached a demonstrable level of outrageousness, you must find the defendants "not guilty."

I charge you, as a matter of law, that it is neither necessary nor appropriate to the task of ferreting out crime for the government to initiate and create criminal activity. You must decide as a matter of fact whether the government initiated the crime, encouraged the defendant, and provided the essential supplies forming the basis of the charges. If so concluded, then you are obligated to find the defendant "not guilty." It is fundamental fairness that will not permit any defendant to be convicted of a crime in which police conduct is outrageous.

Hampton v. United States, 425 U.S. 488; *United States v. Twigg,* 588 F. 2d 373 (3rd Cir. 1978).

Office - Supreme Court, U.S.
FILED
NOV 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1983

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROSS R. CALIGURI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court's charge concerning petitioner's alleged withdrawal from the conspiracy was proper.

2. Whether the trial court should have submitted to the jury petitioner's claim of "outrageous" conduct by Drug Enforcement Administration agents in their undercover operation.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1983. The petition for a writ of certiorari was filed on June 3, 1983. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of conspiring to possess with intent to distribute a quantity of marijuana in excess of 1,000 pounds, in violation of 21

U.S.C. 846 (Count 1).[1] He was sentenced to six years' imprisonment and a fine of $5,000.[2]

1. The evidence at trial showed that in April and May, 1981, special agents of the Baltimore District Office of the Drug Enforcement Administration ("DEA") posed in an undercover operation as sellers of marijuana. In the course of the operation, they offered to sell some 17,000 pounds of marijuana to a group that included petitioner, Edward Dereeder, and James Hubert.

In late April a government informant named Ronald Poe (C.A. App. 241) called Dereeder, his former associate in drug trafficking, and told him that he had 18,000 pounds of marijuana for sale (*id.* at 391). Poe asked Dereeder if he could collect money for the transaction (*id.* at 392). Dereeder contacted Hubert, to whom he had previously sold marijuana (*id.* at 390, 392). Hubert responded that he would contact petitioner, who could buy a ton or more (*id.* at 392). Hubert later told Dereeder that petitioner was interested in buying, but first wanted to inspect the marijuana (*id.* at 393-394). Between the date of Poe's call and May 11, 1981, a number of other conversations took place among members of the conspiracy, including petitioner. On one occasion Dereeder spoke with petitioner on the phone. Petitioner told Dereeder to go to Maryland, inspect the marijuana, verify that the quantity was available, and report back to him. *Id.* at 395. On another occasion

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[1]In addition to petitioner, Edward L. Dereeder, James P. Hubert, George O. Ferguson, Leslie A. Rolph, John Lane, Jr., and John Fulgham were also indicted on three counts. Counts 2 and 3 charged possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a). Dereeder, Rolph, Lane, and Fulgham pleaded guilty. Dereeder testified at petitioner's and Hubert's trial.

[2]Hubert was sentenced to four years' imprisonment and a fine of $5,000.

Hubert and Dereeder visited petitioner at his home. Petitioner at that time again instructed Dereeder to go to Maryland and inspect the marijuana. *Id.* at 539. Hubert later informed Dereeder that petitioner wanted exclusive purchasing rights on the marijuana being offered for sale (*id.* at 402).

On May 13, a tractor trailer carrying 17,000 pounds of marijuana used in the undercover operation was parked at a farm house in Vienna, Maryland (C.A. App. 568-569). That evening Dereeder told DEA agent Robert O'Leary that he had contacted petitioner, who was going to take an "exclusive," and that petitioner would come to Maryland the next day (*id.* at 175-176). On May 15, Dereeder told O'Leary that petitioner would arrive at the Salisbury airport at noon, and that he wanted O'Leary to meet him, which O'Leary agreed to do (*id.* at 182).

Dereeder and Hubert met petitioner at the airport (C.A. App. 183) and introduced him to O'Leary and DEA agent Keith Miller. Petitioner asked Miller "how deep [was] the well?" (Pet. App. 3a n.2). Miller responded that it was deep (C.A. App. 565). Petitioner then asked O'Leary for a sample of the marijuana (*id.* at 188).

After the airport meeting petitioner, Dereeder, and Hubert drove to a restaurant in Ocean City. Dereeder gave petitioner a sample of marijuana he had taken from the tractor trailer the previous evening, and petitioner said he would show the sample to his people (C.A. App. 423-425). They discussed the transportation of the marijuana and its price, and after dinner petitioner left Maryland. During a subsequent telephone call to Hubert petitioner told him that he liked the marijuana, but was concerned about who the sellers were. He asked whether Dereeder knew their identity. *Id.* at 429.

During the weekend of May 16-17, petitioner telephoned Dereeder and voiced his concern that the deal might be an ABSCAM-type operation set up by the government (C.A. App. 432). After reassuring petitioner about the deal (*id.* at 434-435), Dereeder contacted a pilot and asked him to fly petitioner to Maryland (*id.* at 435, 271-272). The trip was later aborted (*id.* at 272, 539).

On May 18, petitioner again spoke with Dereeder by phone, expressed continuing concern about the transaction, and told him that he would not come to Maryland until Hubert had obtained a small load as a sample and brought it to New York (C.A. App. 436).

After that sale was consummated the next day, Hubert and several others were arrested by DEA agents (Pet. App. 3a).

2. Prior to trial, petitioner moved to dismiss the indictment on the ground that his due process rights were violated by the conduct of the undercover operation. The district court reserved ruling on the motion. At the conclusion of the evidence, petitioner sought an instruction submitting the issue of prosecutorial misconduct to the jury (Pet. App. 12a). The request was denied. After the jury returned its verdict, the court conducted a hearing and denied the motion to dismiss (C.A. App. 35).

The trial judge instructed the jury concerning the defense of withdrawal from the conspiracy. Petitioner claimed that he had withdrawn by expressing reluctance to continue his participation because of fear that the deal was an undercover operation. The court instructed the jury that "in order to invoke the withdrawal theory, a defendant must withdraw from the conspiracy before any overt act in furtherance of the conspiracy has been committed." The court stated that "after an overt act [has been] committed, by

some member of the conspiracy, then the defense of withdrawal would not be available to him" (Pet. App. 8a-9a). It rejected a proposed instruction (*id.* at 6a-7a) that the defense was available without regard to the time of withdrawal, as long as the defendant communicated his disavowal to his co-conspirators.

3. The court of appeals held that the district court's withdrawal instruction was a "proper statement of the law" (Pet. App. 4a). It also rejected petitioner's due process claim that his conviction was procured through overreaching by law enforcement authorities. The court observed that, "[d]espite the active role maintained by the Government throughout the investigation, the D.E.A. agents did not press a sale upon an unwilling buyer. Rather, the defendants readily accepted the Government's offer" (*id.* at 5a).

ARGUMENT

1. Petitioner contends (Pet. 14-20) that the trial court erred in instructing the jury that "a defendant must withdraw from the conspiracy before any overt act in furtherance of the conspiracy has been committed" (Pet. App. 8a). He argues (Pet. 18) that, because the conspiracy charged did not require the commission of any overt act, the instruction should have allowed withdrawal at any time before termination of the conspiracy. This claim was properly rejected by the court of appeals, for this case presented no issue of withdrawal, and petitioner was entitled to no instruction on the subject at all.

The general legal principles governing the defense of withdrawal from a conspiracy are well settled. "Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464-465 (1978).

Even after withdrawal, however, a "defendant is still liable * * * for his previous agreement and for the previous acts of his co-conspirators in pursuit of the conspiracy." *United States* v. *Read*, 658 F.2d 1225, 1232 (7th Cir. 1981); *United States* v. *Wooten*, 688 F.2d 941, 947 (4th Cir. 1982); *United States* v. *Nicoll*, 664 F.2d 1308, 1315-1316 & n.7 (5th Cir.), cert. denied, 457 U.S. 1118 (1982); *United States* v. *Lowell*, 649 F.2d 950, 957 (3d Cir. 1981). Thus in conspiracies under 18 U.S.C. 371 withdrawal will exonerate a defendant only if no overt act has been committed. This is because, under the statute, no offense has been committed if there is simply an agreement unaccompanied by an overt act. Once an overt act occurs, the offense is complete. *United States* v. *Nicoll*, 664 F.2d at 1315.[3]

By contrast, a drug conspiracy under 21 U.S.C. 846 is complete upon consummation of the agreement; it does not require commission of an overt act by a participant in the conspiracy. The defense of withdrawal is thus significant in Section 846 conspiracy cases only when the defendant's disavowal of the scheme places his active membership in it outside the period of the statute of limitations. (See note 3, *supra*.) But this case presents no statute of limitations issue. And petitioner's withdrawal (if it in fact occurred) plainly came "too late to avoid liability for the conspiracy." *United States* v. *Nicoll*, 664 F.2d at 1315. Petitioner does not challenge the correctness of the instructions regarding the formation of the agreement or the sufficiency of the evidence to establish his initial membership in the conspiracy. Petitioner's numerous conversations and meetings with undercover DEA agents and his co-conspirators, for the

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[3]Withdrawal may once again become relevant if the time between withdrawal and indictment exceeds the statute of limitations. See, *e.g.*, *United States* v. *Read*, 658 F.2d at 1233; *United States* v. *Lowell*, 649 F.2d at 955-960; *United States* v. *Richardson*, 596 F.2d 157, 164 (6th Cir. 1979).

purpose of settling the details of the drug transactions, consummated the agreement on which the conspiracy charge was based, and precluded the alleged subsequent withdrawal from absolving him of criminal liability.[4]

Even if, as in Section 371 cases, an overt act were required to complete the conspiracy offense, petitioner can have no complaint, since the trial court instructed the jury to acquit petitioner if he took steps to disavow the conspiracy before any overt was committed (Pet. App. 8a).[5]

2. Petitioner also maintains (Pet. 6-14) that the trial court erred in refusing to submit to the jury the question whether the government engaged in improper conduct. This claim is clearly without merit.

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[4]There is no substance to petitioner's contention (Pet. 18-20) that the instruction requiring withdrawal before the commission of any overt act deprived him of a "partial defense." Although withdrawal may preclude liability for substantive acts occurring after the withdrawal, it does not affect the defendant's liability for the conspiracy. *United States* v. *Nicoll*, 664 F.2d at 1315 n.7. Here the only relevant act occurring after petitioner's alleged withdrawal was the May 19, 1981 sale of a small sample load — an act in fact directed by petitioner. Petitioner was not convicted on any substantive charge based on that sale.

[5]Petitioner maintains (Pet. 19), without elaboration, that the court of appeals' decision conflicts with this Court's decision in *United States* v. *United States Gypsum Co.*, *supra*, as well as the decisions of several courts of appeals. *Gypsum* has no bearing on this case, however; withdrawal was an issue in that case because there was a question whether the defendant had continued to participate in the conspiracy within the period of the statute of limitations. See also *United States* v. *Read*, *supra*. Nothing in *Gypsum* modified the rule that, except for statute of limitations purposes, the defense of withdrawal is not available once all the elements of a conspiracy have coalesced.

In *United States* v. *Jimenez*, 622 F.2d 753, 757 (5th Cir. 1980), also cited by petitioner (Pet. 19), the court merely approved a jury instruction tailored to the facts of that case.

The issue whether the government has engaged in conduct so "outrageous" as to violate due process is a question of law for the trial judge, not a factual matter for the jury. As the First Circuit explained in *United States* v. *Johnson*, 565 F.2d 179, 181-182 (1977), cert. denied, 434 U.S. 1075 (1978):

> Under any view, it is the court's province to decide whether defendant's case was such that, if believed, it would fall into the exceptional category mentioned by Justice Powell [in *Hampton* v. *United States*, 425 U.S. 484 (1976)]. If such a determination were left to the jury's unguided discretion, as under the instruction proposed here, the entrapment defense * * * would be transformed into an invitation to twelve jurors to consider in any case whether defendant was treated "fairly." Whatever its possible role in resolving contested factual issues raised by an entrapment defense, the jury is not equipped and should not be permitted to speculate on whether particular facts do or do not amount to fundamental fairness.

See *United States* v. *Russell*, 411 U.S. 423, 441 (1973) (Stewart, J., dissenting) ("the determination of the lawfulness of the Government's conduct must be made — as it is on all questions involving the legality of law enforcement methods — by the trial judge, not the jury"); *Hampton* v. *United States*, 425 U.S. 484, 497 (1976) (Brennan, J., dissenting) (same). The trial judge therefore properly refused to submit to the jury the question whether the government had engaged in overreaching, creating a due process bar to prosecution.

In any event, as a comparison of this case with *Hampton* makes clear, the evidence of governmental "misconduct" was wholly insufficient to warrant an instruction on that defense even if the matter were not for the judge to decide. In *Hampton* the petitioner claimed that government agents

not only bought the heroin he was convicted of distributing, but also supplied it to him. A majority of this Court concluded that those facts did not amount to a denial of due process. 425 U.S. at 490 (opinion of Rehnquist, J.), 491-492 (opinion of Powell, J.). Here the facts disclose nothing more than an offer of sale by the government to a defendant who was willing to purchase more than eight tons of marijuana. "While [there] may some day be * * * a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, * * * the instant case is distinctly not of that breed." *United States* v. *Russell*, 411 U.S. at 431-432.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

NOVEMBER 1983

DOJ-1983-11